UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 29

PERSONAL TOUCH HOME CARE, Inc.
Employer

and Case No. 29-RC-9697

NEW YORK'S HEALTH AND HUMAN SERVICE UNION, 1199/SEIU, AFL-CIO
Petitioner

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, herein called the Act, as amended, a hearing was held before Emily Cabrera, a Hearing Officer of the National Labor Relations Board, herein called the Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.

Upon the entire record in this proceeding, the undersigned finds:

1. The Hearing Officer's rulings made at the hearing are free from prejudicial error and hereby are affirmed.

2. The parties stipulated that Personal Touch Home Care, Inc., herein called the Employer, a New York corporation, with its principle office and place of business located at at 186-18 Hillside Avenue, Jamaica, New York, herein called the Jamaica facility, provides home health care services. During the past year, which period represents its annual operations generally, the Employer derived gross annual revenues in excess of $100,000 and purchased and received at its Jamaica facility, goods, supplies

and materials valued in excess of $5000 directly from points located outside the State of New York.

Based on the foregoing, and the record as a whole, I find that the Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.

3. The labor organization involved herein claims to represent certain employees of the Employer.

4. The petitioned-for unit seeks all full-time and regular part-time home health care aides (HHA) and personal care aides (PCA) employed by the Employer at its Jamaica facility, excluding office clerical employees, guards and supervisors.[1] The Employer contends that the petition does not raise a question concerning representation because the petitioned-for employees do not fall within the statutory definition of employee, as set forth in Section 2(3) of the Act. First, the Employer contends that all of its PCAs and HHAs fall within the "domestic service" exemption of Section 2(3) of the Act. Second, the Employer argues that the petitioned-for unit employees are independent contractors, also excluded from Section 2(3) of the Act. In support of its position, the Employer called as its sole witness, vice president Martin Focazio, to testify. The Petitioner called no witnesses.

The Employer is a home care agency and it places individuals in the homes of the elderly or infirm to assist with their various needs. Approximately 60% of its work

[1] The Union amended its petition on the record indicating that it only seeks PCAs and HHAs. The initial petitioned-for unit also included home attendants. However, upon the Employer's counsel representation that no such classification existed, the Union amended its petition to reflect the unit defined above. Although the Employer's counsel indicated that the Employer does not employ any other employees at its Jamaica facility, that appears not to be the case. The Employer employs approximately 62 coordinators and 40 registration department employees, whose job duties and responsibilities are described more fully below. It appears from the record that the Union does not seek to represent these employees.

force are PCAs and 40% of its work force are HHAs. According to the Employer's job descriptions in the record, HHAs carry out personal care and health related tasks and may also provide assistance with housekeeping for a particular patient. Personal care responsibilities include assisting with bathing, bathroom needs, oral hygiene, care of hair and nails, skin care, dressing, shaving, and position or turning patients. HHAs also perform certain medical-related treatments, such as changing non-sterile dressings, testing urine, taking vital signs such as temperature, pulse and respiration, collecting specimens and reminding patients to take their medication. HHAs also assist in homemaking tasks, such as meal planning in accordance with modified diets, feeding, listing grocery needs, change of linens, laundry, and light housekeeping (i.e., washing dishes, cleaning the bathroom, dusting and vacuuming).[2] HHAs must be licensed by the State of New York's Department of Health. Approximately 60% of the work performed by HHAs involve personal care and medical related functions; the remaining 40% of their work involves domestic duties.

According to the Employer's job description, PCAs provide assistance with nutritional and environmental support, personal hygiene, feeding and dressing. They perform some of the same personal care functions as HHAs, i.e., they assist with bathing, bathroom needs, oral hygiene, care of hair and nails, skin care, dressing, shaving, or turning patients. Their homemaking duties are also similar to those

[2] See Employer Exhibit 8. The job description also indicates that certain functions are generally performed only after demonstration by a registered nurse, i.e., tub bath or shower; care of catheter drainage bag; non-sterile dressing; ace bandage or elastic stocking use; exercise programs; change of colostomy appliance; irrigation of colostomy; use of rehabilitative devices; special skin care; and application of certain binders and other supports.

performed by HHAs, i.e., they plan meals in accordance with modified diets, feed patients, change linens, do the laundry, perform light housekeeping chores and list grocery supplies. However, it is clear that the PCAs do not perform some of the health-related tasks performed by HHAs. For instance, the PCAs do not change dressings, test urine, take vital signs, or collect specimens. According to the Employer's job description, PCAs must have successfully completed a New York State approved training program.[3] The Employer contends that 60% of a PCA's job involves homemaking duties and only 40% of the work includes personal care.

The Employer's business is derived from contracts with different types of home health agencies referred to in the record as vendors. These vendors contact the Employer to request that it place an aide in a patient's home for a specific number of hours over a period of time. The Employer has no control over the hours, duration or location of a particular assignment. The vendor agency determines the specific plan of care under which the aide will work. For instance, the vendor will prepare a "care plan" which sets forth in detail the care needed by the patient. A copy of the care plan is sent to the Employer and is also maintained in the patient's home. The Employer has no authority to modify this plan of care and if the aide assigned to that patient has a problem with the care plan, the aide telephones the vendor. The vendor reimburses the Employer a monetary amount for each aide the Employer places in a patient's home.[4]

[3] See Employer Exhibit 7.

[4] No party to this proceeding contends that the Employer is a joint employer with the vendors. I am mindful of the Board's recent decision in *M.B. Sturgis*, 331 NLRB No. 173 (2000), where the Board set forth the test for establishing whether jointly-employed employees, supplied by a "supplier employer" and working at the "user employer" facility, can be included in a unit of employees employed solely by the user employer. In the instant case, it would appear that the Employer herein is the supplier employer, inasmuch as they supply the labor the vendor seeks. Thus, the vendor would be considered the "user" employer.

It appears that a significant portion of the Employer's work is derived from its contract with New York City's Department for the Aging, herein called DFTA. The record establishes that, for the most part, PCAs are sent to those jobs. Although the Employer contends that DFTA has its own job description for PCAs, the job description is similar to the Employer's job description. For instance, PCAs that are assigned to DFTA cases assist in changing beds, dusting, vacuuming, light cleaning, dishwashing, listing needed supplies, shopping, laundering, meal preparation, payment of bills, escorting to various community activities and some heavy duty cleaning.[5] According to the Employer, it receives approximately 500 cases per month from DFTA that involve only housekeeping duties. There are an additional 800 DFTA cases per month where the aides are required to perform some personal care work that is health-related, but, these 800 cases are mostly domestic in nature. Generally, the Employer claims that on some days, aides can spend between 70% to 80% of their time on domestic-related activities.

An individual must apply for a position with the Employer in order to be placed in the Employer's labor pool. The Employer advertises in newspapers and by word of mouth. Upon arrival at the Employer's Jamaica facility, applicants are given an employment application to complete. The applications are maintained in the Employer's

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Nevertheless, the Petitioner herein did not seek to amend its petition to include the vendors, and, in *Professional Facilities Management, Inc.*, 332 NLRB No. 40 (2000), the Board held that "a petitioner may seek to bargain only with a single supplier employer on behalf of its employees in an appropriate unit, even though the employees may be jointly employed by one or more user employers." Thus, the fact that employees may be jointly employed does not require that a petitioner name the joint employers or litigate the existence of a joint employer relationship. *Id*.

[5] Employer Exhibit 9. The last two pages describe the work of DFTA PCAs.

registration department. There are 40 employees employed there who assist an applicant in completing the application process. The aides are required to have the requisite certification.[6] They are required to take a written test for basic reading, writing and English language skills, submit references, submit to a physical, a drug test, a criminal background check and finally, a "central registry check" is performed. The "central registry check" informs the Employer as to other home health care agencies for whom the applicant works.[7] The Employer also checks that their certificates or certifications are valid. The Employer's registration department employees check on the applicant's references and, if a negative reference is received, the Employer may determine not to hire that individual. The registration department employees also check to ensure that the applicant has passed the Employer's written exam. The physical administered to the applicant is required by New York State's Department of Health. If the applicant meets the Employer's needs, the applicant completes a W-4 income tax withholding form. In addition, the Employer provides the individual with copies of its handbook, discussed more fully below. Vendors play no role in the hiring process.

The Employer maintains a list of individuals who either have worked with the

[6] It is somewhat unclear from the record as to what the requirements are in this regard. Pursuant to Employer Exhibit 8, HHAs are required to have successfully completed a New York State approved home health aide training and pass the required competency test. It appears that this requirement is different than the requirements for PCAs. In this regard, according to Employer's Exhibit 7, the qualifications require that a PCA successfully complete a State approved "training program" with the appropriate clinical supervision. Regardless of the type of certification or approved training required, it appears that the Employer checks to ensure that all of its aides have completed the requisite qualifications for each classification.

[7] This central registry check only shows the number of agencies with whom the aide is registered. It does not reflect whether the aide is currently performing an assignment for the other agency. The central registry check does not reflect how long the aide has been registered with the other agencies. At most, it will reflect whether other agencies have terminated that particular aide, which would be a matter of concern to the Employer.

Employer in the past or have indicated a willingness to do so. In order to fill a vendor's request, employees referred to as coordinators phone individuals off this list to offer them the position. The Employer employs approximately 62 coordinators in its Jamaica office whose responsibilities include calling employees on the Employer's payroll lists to describe the care plan to the employee when offering the work. If the duration of the job is available, the coordinator will inform the aide. Should the individual decline the work, the coordinator calls another aide on the list until the position is filled. According to the Employer, a coordinator can call as many as 10 employees before an employee accepts the assignment. Aides may reject certain assignments because they are not located close to that aide's home, the hours of work are not convenient, or because the employee makes more money on another job through another home health care provider. The record shows that between January 2001, through the date of the hearing, about 28 weeks, the Employer employed approximately 3393 aides. Of this number, 1880 employees worked at least one day per month since the beginning of January. There were 1439 aides who worked in each of the 28 weeks since the beginning of the year.[8]

With respect to wage rates of the petitioned-for employees, as indicated above, the Employer's contracts with the vendors sets forth the amount the vendors have agreed to pay the Employer for placement of the aide in a patient's home. For the most part, the Employer determines how much it will pay the aide on an hourly basis, above and beyond the rate paid to it by a vendor. According to the Employer's witness, there are two vendors that dictate the hourly wage rate to be paid to the aides. Thus, for the aides that are dispatched pursuant to these vendors' contracts, the Employer does not exceed

[8] Employer Exhibit 1b. It is not clear from this record how many hours per week, in each of these 28 weeks, that employees worked.

the vendor's rate.[9] However, for the remaining 15 or 20 vendors, the Employer can pay more than the rates set forth in the vendor's contract with the Employer. The difference in hourly wage rates primarily depends upon the assignment involved. If an aide performs additional work or assisted on another case when another aide failed to show up, the coordinator can offer an increase in the wage rate. It appears from the record that when the Employer was awarded the DFTA contract, it hired all of the aides that worked directly for DFTA. Upon their hire by the Employer, the Employer continued to pay these employees DFTA wage rates, although the Employer has also granted wage increases to these employees over the years. It is undisputed that the homeowner/patient does not pay the aides directly.

It is also undisputed that the Employer has a limited on-site supervisory role once an employee receives an assignment. As indicated above, the vendors set forth the care plan for each patient and thereafter, registered nurses, employed by the vendors, visit the patient's home to see if the patient is receiving the proper care. Depending upon the vendor involved, a registered nurse may be sent once a week, once every two weeks, twice a month, monthly or once every six weeks. The Employer does not send any of its own managers or supervisors to check on the quality of the care provided.[10] However, the Employer's coordinators, on a daily basis, call some, if not all or most, of the patient's home to ensure that the aide has arrived on time. During these daily telephone checks, the Employer asks if the aide had a difficult time travelling to the patient's home or if the patient is in need of a nurse. The Employer can offer

[9] The Employer can, however, pay an aide in excess of the vendor-specified contract rate if, for instance, the case assignment is particularly difficult or because an aide is filling in for another absent aide.

[10] However, it appears that the Employer has one nurse that visits aides that work pursuant to the DFTA contract. These visits occur once every three months.

suggestions on how to deal with certain workplace problems and offers the aide the opportunity to "come off" a case if they are having difficulty with a patient. The Employer will remove an aide from a case if, in its judgment, the aide is not working well with the patient. After an aide is removed from a case, they meet with the Employer's complaint department to review the problems and see if the matter can be settled. In this regard, it appears that the Employer has a committee of three individuals who listen to aides' complaints about a case. The committee tries to place the aides in another job, if necessary.[11] If a vendor requests that a particular aide be removed from a patient's home, the Employer will comply with that request and will replace that aide with another. The Employer admits it has issued warnings, suspensions and has terminated aides for tardiness or poor performance, even absent a request by the vendor. If an aide fails to show up at an assignment, and has not provided 8 hours of advance notification, the Employer suspends that employee.

The Employer has created a handbook which is distributed to each employee during orientation.[12] The handbook's provisions applies to all of the Employer's aides. The handbook has a number of provisions that relate to conditions of employment set by the Employer. For instance, the Employer "strictly prohibits" aides from subcontracting or assigning their cases to another aide, i.e., the aide cannot send another person in his/her place if the aide is not able to handle the assigned case. According to the handbook, any such actions are grounds for immediate dismissal. If an aide cannot fulfill his/her assignment, the aide must call at least 8 hours in advance of the shift starting

[11] Apparently, this committee is also designed to hear employee complaints on other work-related matters. For instance, if an aide complained that he/she was entitled to additional vacation time, which is provided by the Employer, the committee checks on the status of that employee's accrued vacation time.

[12] Petitioner's Exhibit 1.

time. If the aide cancels with less than 8 hours notice, the aide is placed on probation. A second such cancellation is "possible grounds for immediate termination." Any aide that fails to show up at an assignment without calling faces immediate dismissal. When an aide cannot perform the scheduled shift, they are prohibited from calling the patient; instead, the aide is requested to telephone the Employer and it sends a replacement aide. The handbook also allows for merit wage increases if recommended by "the nurse, coordinator and/or office manager." The wage increases are not automatic and are based on past performance. The handbook contains a code of conduct, which lists various acts that may lead to disciplinary action up to and including discharge. They include: insubordination; abusive language; unauthorized use of drugs; sleeping on the job; fighting on the job; destruction of property; insufficient or unacceptable work; safety violations; confrontations with patients; theft; excessive absenteeism; disclosure of the aide's home telephone number or address; or sexual harassment violations. Aides are not permitted to accept gifts of any kind from patients. The Employer's handbook also encourages aides to bring their work-related problems to a coordinator who tries to resolve these issues. If the coordinator is unable to resolve an issue satisfactorily, the aide may see the office manager, and request a review by the vice president or president of the company.

Evaluations are performed every three months by the vendor's registered nurse.

In addition, the Employer's supervisors perform evaluations.[13] The Employer evaluations are required by the New York State Department of Health and are performed once a year. The evaluations are reviewed to ensure that an aide is providing the care required by the vendor. It is unclear from the record how the Employer's evaluations differ from the periodic evaluations performed by the vendors' nurses. With respect to the evaluations by the vendors, if the registered nurse discovers that an aide is performing below the expected level, the nurse discusses the performance problems with the aide and provides on-the-job training. The vendor's nurse forwards a note regarding the performance problems witnessed by her and indicates that training was provided in order to correct the problem. Although it appears that, every few months, the Employer contacts the patients directly to inquire about the adequacy of service, generally, only the nurses employed by the vendors discover acts of misconduct, substandard service or failure to follow a patient's care plan. If a nurse discovers substandard service, the matter can be reported to the Employer verbally and the Employer can discuss this issue with an aide directly.

The petitioned-for employees may perform work on behalf of a number of agencies. An aide may be assigned to a job referred by the Employer for a certain number of days per week, and, during the same week, may perform similar work on behalf of another employer in another patient's home. According to the Employer, all of

[13] In this regard, the Employer's witness testified that the Employer does its own "supervisory evaluations…by our own nurses." (Tr. 68). Additionally, the Employer's handbook, at page 13, refers to yearly clinical evaluations performed by a nursing supervisor. It is unclear from the record how many nurses the Employer directly employs or their specific work functions. Although the hearing officer repeatedly asked the Employer to identify all employees employed by the Employer at its Jamaica facility, counsel repeatedly replied that there were no other employees employed at that location. However, it appears from the record that the Employer has some unidentified number of nurses, and neither party has taken any position as to their inclusion or exclusion from the unit. Inasmuch as the Petitioner has not indicated that it seeks to represent these employees, they shall not be included in any unit finding.

its aides are registered with other home health care placement agencies and can work for those entities at any time.

It is undisputed that the Employer issues checks to the petitioned-for employees and makes the appropriate governmental tax deductions, i.e., FICA and other Federal and New York State tax deductions. As indicated above, all the petitioned-for employees complete W-4 forms. In order to be paid, an employee must complete a weekly activity sheet which indicates the hours worked by the employee. The activity sheet is signed by the patient. It is also undisputed that the Employer provides certain benefits to the aides. For instance, the Employer has a 401K plan, health benefits, holiday pay for employees that work on a holiday, paid jury duty, paid vacation based on the number of hours worked each year, workers compensation, disability insurance and unemployment insurance.[14] According to the Employer's handbook, employees receive a half hour lunch break for every four hours worked. Other than a uniform, paid for and provided by the Employer, bearing the Employer's logo, the aides do not bring any other equipment with them on the job. Aides can, and frequently do, purchase additional uniforms that are either white, blue or pink. The New York State Department of Health requires that all aides wear identification badges, but these badges bear the Employer's name. The Employer also provides in-service training programs. The training is provided by the Employer's staff and a class is given whenever one can be assembled. The training is required by New York State Department of Health, but the Employer sets the curriculum.

[14] It appears from the record that the 401K plan is solely based on employee contributions. The Employer's witness did not know if the Employer contributes to the health insurance plan.

Based on all of the evidence described above, the Employer contends that the petitioned-for employees are either domestic servants or independent contractors, and, therefore, excluded from Section 2(3) of the Act. Taking each argument in turn, I reject the Employer's argument that the petitioned-for employees are domestic servants. The main relevant record evidence in support of this argument is that aides working pursuant to the DFTA contract spend most of their work day performing housekeeping and domestic-related duties and that a significant percentage of the work performed by all of the Employer's aides is domestic in nature. However, the Board has long held that the domestic servant exemption is not evaluated by the "undisputedly domestic nature" of some of the services rendered. In this regard, in *Ankh Services, Inc*., 243 NLRB 478, at 480 (1979), the Board examined the legislative history of the Act regarding the domestic service exclusion and held that Congress meant it to exclude domestic servants only. Thus, the Board held:

> The Congress did not, however, elaborate on the term domestic servant, nor did it define the scope of any particular employment relationship it may have intended to exempt from the operation of the Act in this regard. Nor, apparently, have the Supreme Court or lower Federal courts been called upon to construe the parameters of the domestic service exclusion of the Act. Thus, neither the Congress nor the courts have given us any reason to believe that the former intended to exclude from the coverage of the Act any other than those individuals whose employment falls within the commonly accepted meaning of the term domestic servant.

In *30 Sutton Place Corp*., 240 NLRB 752, fn. 6, the Board viewed the "commonly accepted meaning" of domestic service as an employment relationship developed on an individual and personal basis created between the homeowner and the employee. Thereafter, in *Ankh*, the Board laid out the test for domestic service, focusing

on the principals to whom the employer-employee relationship 'in fact' runs, and not merely on the undisputedly domestic nature of some of the services rendered. The *Ankh* employees were in-home service workers, paid by the employer, and were not employed by the homeowner or residents in whose homes the employees provided their services. Although the employees rendered their services to the clients, they essentially performed these services on behalf of the employer and the client had no control over the wages, hours or other terms and conditions of the employees' employment.[15] Based on the above, the Board concluded that the in-home service workers did not fall within the domestic servant exclusion envisioned by the Act.

I conclude that the factual circumstances herein are similar to *Ankh*, and find that the petitioned-for HHAs and PCAs are not domestic servants within the meaning of the statute. The petitioned-for employees undisputedly receive checks from the Employer, not the patient, and take all of their work-related direction from the care plan prepared by the vendor. Also noteworthy is that the Employer specifically prohibits the petitioned-for employees from receiving any gifts of any value from the patient. The aide may not even divulge his/her home address and telephone number to the patient. These factors support the conclusion that the employer-employee relationship is with the Employer herein and not with the patient or homeowner. Although there is evidence that the petitioned-for employees spend significant portions of their day performing housekeeping and domestic-related services, as noted above, the nature of the service provided is not the major factor in evaluating whether an employee is a domestic servant exempted from Section 2(3) of the Act. Based on the above, I reject the Employer's argument in this regard.

[15] See *Ankh*, at footnote 16.

The Employer also contends that the petitioned-for unit employees are independent contractors, and, therefore, not employees within the meaning of Section 2(3) of the Act. The Board has long held that any party seeking to exclude employees on statutory grounds has the burden of proof. Indeed, the Supreme Court recently upheld this view. See *Kentucky River v. NLRB*, 121 S.Ct. 1861, 167 LRRM 2164 (2001) (where the Court held that the "general rule of statutory construction is that the burden of proving justification or exemption under a special exemption to the prohibitions of a statute generally rests on the one who claims its benefits.") In my view, the Employer has not met its burden of establishing that the employees herein are independent contractors and excluded from the Act's protection.

In *Roadway Package System,* 326 NLRB 842 (1998) and *Dial-a-Mattress Operating C*orp., 326 NLRB 884 (1998), the Board re-examined the test for determining whether an individual is an employee or an independent contractor and adopted the common law test of agency. This test, as described in Restatement (Second) of Agency, Section 220, lists factors that should be considered in determining employment status, including: whether the work performed is an essential part of the company's regular business; whether the person is engaged in an occupation or business that is distinct from the company's regular business; the length of time for which the person is employed or contracted; the skill required in the particular occupation; whether the company provides the tools and instrumentalities necessary to perform the work; the method of payment; and the extent to which the company controls the details of the work. No one factor is determinative. The Board in *Roadway* explained that all factors regarding the parties' relationship must be considered, not just those involving the right

to control. One pre-*Roadway* case involving home health care attendants, *People Care, Inc*., 311 NLRB 1075 (1993) examined the company's control over the manner and means of the work performed by the unit employees, but evaluated many other factors encompassed by the common-law test of agency. In that case, the Board held, on very similar facts, that PCAs and HHAs were not independent contractors because the employer set the wages and terms and conditions of employment for the unit employees; federal and state taxes were withheld from employees' pay; contributions were made to workmen's and unemployment compensation funds; the employer's personnel policies were applied to the unit employees; and the employer disciplined employees. Thus, it appears that the Board's analysis in *People Care* is not necessarily inconsistent with the Board's declaration in *Roadway* that all aspects of the parties' arrangements, including the parties' financial interdependence and entrepreneurial activity, must be considered.

As both the Board and the Supreme Court have acknowledged, it is often difficult to determine whether a person is an employee or independent contractor and "there is no shorthand formula or magic phrase that can be applied to find the answer." *NLRB v. United Insurance Co. of America*, 390 U.S. 254 (1968). Typically, factors exist on both sides of the issue and all factors must be carefully analyzed.

In the instant case, there are some factors that support an independent contractor finding. For instance, New York State regulates certification, requires training and annual evaluations; the Employer has no control over the hours, duration or location of an assignment; the vendor sets the plan of care; aides may reject assignments; there is a limited on-site supervisory role by the Employer; and employees performance is evaluated every three months by the vendors' nurse. Thus, there is evidence that, to

some extent, either the State or the Employer's contracting vendors effectively control the manner and the means by which the aides perform their work.

However, there are other factors that support a Section 2(3) finding. In this regard, it is undisputed that the employees receive checks from the Employer and that the Employer withholds FICA and other State taxes. The petitioned-for employees receive vacation pay, holiday pay, jury duty pay and are eligible to participate in the Employer's 401K plan and health insurance plan. The Employer establishes their lunch hours. The employees are also covered by workers compensation, unemployment insurance and disability benefits. It also appears that the Employer can determine how much to pay the aides. Although there is evidence that, in some cases, the Employer's wage rate is identical to the rate specified in the vendor-Employer contract, the Employer can, and has, given raises to aides. While the Employer does not have much control in assessing the on-site performance of the aide, it calls the patient's homes on a daily basis to ensure attendance, has offered suggestions on, and has a committee to deal with, workplace problems and offers aides the opportunity to "come off" a case if they so choose. It is also undisputed that the Employer may discipline employees for a variety of reasons and that the Employer has issued warnings and suspended and terminated employees. The Employer also has a detailed handbook which prohibits aides from subcontracting their work, has a code of conduct, and sets forth the evaluation process. In addition, the petitioned-for employees exhibit few traits of a true entrepreneur. There is no capital investment on their part. They assume no costs of patient care, they do not bring their own equipment, they are provided with at least one

uniform and they are prohibited from securing a replacement if they are unavailable to work.

When considering these factors against the principles outlined in Restatement (Second) of Agency, Section 220, it appears that the work performed by the petitioned-for employees is an essential part of the company's regular business; they are engaged in an occupation or business that is ***not*** distinct from the company's regular business; the Employer essentially provides the tools and instrumentalities necessary to perform the work; aides can neither subcontract nor assign others to perform their assigned duties at a patient's residence; and they are paid by the Employer directly, payroll taxes are withheld and benefits are provided. There are other factors to be considered as well, namely, the length of time for which the person is employed or contracted and the extent to which the company controls the details of the work. The evidence established that a significant portion of the Employer's aides work on a regular basis. Although the aides may work for other home health agencies, the evidence showed that approximately 1439 aides worked for the Employer for about 28 weeks since January 2001. Thus, the Employer seems to have a workforce that remains on its active payroll for a substantial period of time. With respect to the extent to which the Employer controls the details of the work, there is some evidence, as noted above that on-site supervision primarily lies in the hands of the vendors' nurses. However, the Employer does have an extensive discipline policy, personnel rules and responds to the aides' on-the-job problems. In evaluating all of the factors described above, the evidence does not establish that the Employer has met its burden of proving that PCAs and HHAs are independent contractors. To the contrary, the record demonstrates the existence of an employment

relationship and that the petitioned-for individuals are employees within the meaning of Section 2(3) of the Act.[16]

Having found that Section 2(3) of the Act covers the petitioned-for employees for the reasons noted above, I find that a question concerning representation exists.

5. As indicated above, the Petitioner seeks to represent HHAs and PCAs employed by the Employer out of its Jamaica facility. The Employer contends that petitioned-for employees work on such a sporadic basis that they are casual employees and as a result, they cannot be included in any bargaining unit.

It is well established that regular part-time employees are included in a unit with full-time employees whenever the part time employees perform work within the unit on a regular basis for a sufficient period of time during each week or other appropriate calendar period to demonstrate that they have a substantial and continuing community of interest with the remainder of the unit. See *Fleming Foods*, 313 NLRB 948 (1994), where the Board included part time warehouse clerical employees who worked in that classification between 20 to 24 hours per week. Where the number of employees fluctuate from week to week, but a substantial number of them report and work fairly

[16] In its brief, the Employer cites some cases that I find to be distinguishable. First, the Employer cites *Big East Conference*, 282 NLRB 335 (1986), where the Board upheld the ALJ's determination that officials of the Eastern Conference Basketball Association were independent contractors. In that case, the officials had full time jobs with other employers, were paid on a per game basis, and there were no deductions for withholding, workmen's compensation, unemployment insurance, social security taxes, or fringe benefits. They paid for their own health insurance, purchased their own uniform and were never disciplined by the employer. By contrast, in the instant case, employees receive an hourly wage rate, all deductions are made on their behalf, they may receive health insurance and other benefits from the Employer and employees have been disciplined by the Employer.

AmeriHealth Inc., 329 NLRB No. 55 (1999), cited by the Employer, is also distinguishable. In that case, the employer recruited a network of participating doctors who provided health care services. Those doctors contracted with other health insurance companies including the employer involved therein. A significant distinguishing fact in that case is that the doctors employ staffs of their own, such as nurse practitioners, registered nurses, medical assistants and secretaries, whose compensation is determined by the doctor and not by *AmeriHealth*. The Board affirmed the Regional Director in finding these doctors to be independent contractors. The Director, with Board approval, found that the doctors retained economic

regularly over a period of several months, the Board has concluded that such evidence is "scarcely a pattern of a temporary, part-time or casual work force." *Fresno Auto Auction* 167 NLRB 878, 879 (1976). In that case, the Board held that "in determining the relative regularity or permanence of the employment in the proposed unit, this fact outweighs those considerations having to do with the individual's freedom to determine his own work schedule or report for work intermittently." Also see *Henry Lee Co*., 194 NLRB 1107 (1972), where the Board held that employees engaged in unit work for a "substantial period each week, even on an unscheduled basis" are considered regular part-time employees. On the other hand, the Board has concluded that irregular part-time status warrants a finding that the employee is a casual employee and is excluded from the unit. In *Royal Heath Restaurant*, 153 NLRB 1331 (1965), the Board found that an employee who worked 1 day per week in the quarter preceding the election was considered a casual employee. Considerations such as the ability of an employee to accept or reject employment is not determinative of a casual status finding. Rather, the test for whether an employee is a regular or casual part-time employee takes into consideration such factors as regularity and continuity of employment, length of employment and similarity of work duties. See *Pat's Blue Ribbons*, 286 NLRB 918 (1987) and *Tri-State Transportation*, 289 NLRB 356 (1988). Regularity does not necessarily mean a fixed schedule; rather, this requirement can be satisfied by evidence that an employee has worked a substantial number of hours within the period of employment prior to the eligibility date and there is no showing that work is on a sporadic basis. See *Pat's Blue Ribbon*, supra at footnote 6. Infrequent employment can

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separateness and had wide entrepreneurial control. The aides in this case clearly have less entrepreneurial control than the doctors in *AmeriHealth*.

lead to a casual status finding. *Callahan-Cleveland, Inc*., 210 NLRB 1355, 1357 (1958) and *Columbia Music and Electronics*, 196 NLRB 388 (1972). However, in *Mercury Distribution Carriers*, 312 NLRB 840 (1993), the Board held that an employee's option to turn down work and the fact that an employee did not call in every day did not preclude a finding of regular part-time status.

In the instant case, the Employer essentially asserts that the entire unit is composed of casual employees, or employees who are employed on an irregular part-time basis. The record evidence does not support that conclusion. In this regard, I note that Employer's Exhibit 1b is particularly illuminating. That document sets forth the number of employees who worked any given number of weeks since January 2001. Thus, there were 1439 employees that worked in each of the 28 weeks since the beginning of this calendar year, all or part of those weeks. This weighs heavily against the Employer's contention that the unit consists entirely of casual employees. Other record evidence establishes that HHAs and PCAs are more akin to regular part-time employees rather than casual employees as asserted by the Employer. Employer's Exhibit 6 is also telling in this regard. That document is a list of 3393 employees employed by the Employer since January 1, 2001, up to the date of the hearing.[17] Of

[17] It should be noted that this document appears to be a payroll list of all employees employed by the Employer since January 2001, even though some of those employees worked less than one hour in the last 6 months. The document appears to be a running list of all employees whom the Employer employed, no matter how short their tenure.

The Employer also submitted other payroll documents into the record but which I accord less weight. In this regard, the Employer submitted "Payroll Analysis" documents for calendar years 1997 through 2001. See Employer Exhibits 1A (for 2001) and Employer Exhibits 2 through 5 (for 2000 through 1997, respectively). Those documents essentially show the number of employees working for any given number of months in every calendar year. For instance, for calendar year 2000, the number of employees who worked at least one day in each month totals 1497; the number of employees who worked at least one day per month for 11 months is 139; the number of employees who worked at least one day per month for 10 months is 140, and so on. In according less weight to these documents, first I note that for the years 1997 through 2000, these documents are an analysis of the Employer's work force for periods long before the filing of the petition and have less evidentiary value as other exhibits in the record. Second, with respect to

these employees, all but approximately 200 averaged 4 hours per week since January 2001, the two quarters preceding the filing of the petition. Approximately 2152 employees averaged between 25 to at least 40 hours per week in the two quarters immediately preceding the filing of the petition. Finally, there are approximately 1097 employees that averaged more than 40 hours per week in the two quarters preceding the filing of the petition. To be sure, there is evidence that there are employees who have averaged only one week of work or less since January 2001. As noted above, an irregular part-time or casual employee is generally an employee who averages less than 4 hours per week in the quarter preceding the eligibility date. Here, the evidence shows that approximately 200 out of 3393 employees that appeared on the Employer's payroll since January 2001, averaged less than 4 hours per week since that date. The remaining employees all averaged at least 4 hours per week or more since January 2001. Thus, the record establishes that, while some employees may be characterized as casual or irregular part-time employees, the vast majority work a sufficient number of hours to qualify them as either full-time employees, or regular part-time employees. Thus, I reject the Employer's argument that the unit consists predominately of casual employees.[18]

Employer Exhibit 1A, that document shows the number of employees who worked at least one day per month in 2001. I note that the number of months worked this year is not relevant to the inquiry herein. We are only concerned with the number of hours worked during the payroll period preceding the eligibility date, and not the number of months worked this year, or in prior years. Other documents in the record are more relevant to the inquiry. For instance, Employer Exhibit 6, on which I place particular weight, indicates each employee's average hours worked per week since January 2001, and the actual number of weeks worked since January 2001. Thus, Employer Exhibit 6 is more appropriate for analyzing the regularity of the Employer's current work force for the purpose of this proceeding.

[18] In its brief, the Employer cited some cases in support of its position that the entire petitioned-for unit consists of casual employees. However, I find these cases to be distinguishable First, the Employer cites *Pekowski Enterprises, d/b/a Expo Group*, 327 NLRB 413 (1999), as standing for the following propositions: casual employees are those who lack a community of interest with regular employees to be included in the unit; employees who work for various companies on an as-need basis are considered to be casual; and employees who work for other competitors in the industry can be found to be casual employees.

However, it is undisputed that the unit employees' hours of work can vary. Where an employer's employees have varying hours of work, the Board has devised specific formulas to determine employees' eligibility to vote based on the hours worked during a particular period. In this regard, the Board has long held that various standards, such as hours worked per day or week, or days worked per calendar period, have been applied in different industries to determine whether a part-time employee is regular or casual. In *Davison-Paxon Co*., 185 NLRB 21, 23-24 (1970), the Board concluded that employees who averaged 4 hours per week for the quarter preceding the election eligibility date had a sufficient community of interest to warrant their inclusion in the bargaining unit. Where there is a wide disparity in the numbers of hours worked by part-time employees, the Board may fashion an appropriate standard to assure an equitable formula. In the health care industry, particularly with nurses, the Board has laid out two standards. The first standard was set forth by the Board in *Marquette General Hospital*, 218 NLRB 713 (1975).[19] In that case, the Board found that on-call nurses who worked a minimum of 120 hours in either of the 2 quarters preceding the eligibility date were eligible to vote. In three later cases, *Sisters of Mercy Health Corp*.,

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However, the ALJ in *Expo* went further and explained that the Board applies certain eligibility formulae, such as the *Davison-Paxon* formula discussed more fully in this Decision, to determine whether a particular employee has worked a sufficient number of hours in a particular time period to warrant inclusion in the unit. I have applied a similar analysis here, which is set forth more fully above.

The Employer also cites *Pilot Freight Carriers*, 223 NLRB 286 (1986). That case involved a *Gissel* bargaining order and the judge found that certain employees were casual (and excluded from the unit) because they worked irregular hours and only when the employer needed their services. Id. at p. 303. Here, I do not find that the petitioned-for employees, as a group, work such irregular hours to warrant a casual status finding. Similarly, the Employer's reliance on *El Rancho Market*, 235 NLRB 468, 474 (1978) is also misplaced. There, the Board held that one particular employee was a casual employee and excluded from the unit because he did not work any hours during the payroll period immediately preceding the election. Here, I find that a substantial number of employees work a sufficient amount of hours to warrant a finding that they can be included in a bargaining. However, as discussed more fully above, an eligibility formula shall be utilized to weed out those employees whose hours of work are so irregular that they will not be eligible to vote.

298 NLRB 483 (1990), *Northern California Nurses Association*; 299 NLRB 980 (1990) and *Beverly Manor Nursing Home*, 310 NLRB 538 (1993), the Board declined to apply the *Marquette* standard. The Board explained when, and under what circumstances, application of the restrictive *Marquette* formula is appropriate. In *Sisters of Mercy, Northern California*, and *Beverly Manor*, the Board indicated that in determining the status of on-call employees in the health care industry, it has utilized various eligibility formulae as guidelines to distinguish regular part-time from those whose job history with the employer is sufficiently sporadic that it is characterized as casual. In *Sisters of Mercy*, the Board indicated that it devised the *Marquette* formula where there was a significant disparity in the number of hours worked by that employer's on-call nurses. However, the Board indicated that, where on-call nurses, as a group, work on a regular basis, the more liberal *Davison-Paxon* eligibility formula applies. More relevant to the instant case is the Board's extension of the *Davison-Paxon* eligibility formula to health care employees working out of individual patients' homes. Thus, in *People Care*, 311 NLB 1075 (1993), the employer employed PCAs and HHAs in individual patients' homes, similar to the unit employees herein. The Board applied the *Davison-Paxon* formula in that case, rather than the more restrictive *Marquette* formula. See *People Care*, supra, at footnote 1, where the Board specifically denied the employer's request for review concerning the eligibility formula issue. More recently, in *Five Hospital Homebound Elderly Program*, 323 NLRB 441 (1997), the Board applied the *Davison-Paxon* formula to a part-time home health care manager who provided skilled nursing care for patients at their homes.

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[19] During the hearing, the Employer's counsel refused to take a position on an eligibility formula. However, in its brief, counsel now argues that the *Marquette* formula is appropriate.

Based on the Board's findings in *People Care* and *Five Hospital Homebound Elderly Program*, it appears that the Board intends to apply the *Davison-Paxon* eligibility formula to employees providing in-home patient care. Therefore, all HHAs and PCAs working 4 hours per week in the quarter preceding the eligibility date herein shall be eligible to vote. Based on all of the above, the following unit is appropriate for the purposes of collective within the meaning of 9(b) of the Act:

> All full-time and regular part-time home health care aides (HHA) and personal care aides (PCAs)[20] employed by the Employer out of its 186-18 Hillside Avenue, Jamaica, New York, facility excluding office clerical employees, coordinators, registration department employees, guards and supervisors as defined in the Act.

DIRECTION OF ELECTION

An election by secret ballot shall be conducted by the undersigned among the employees in the unit found appropriate at the time and place set forth in the notice of election to be issued subsequently subject to the Board's Rules and Regulations. Eligible to vote are employees in the unit who were employed during the payroll period ending immediately preceding the date of this Decision, including employees who did not work during that period because they were ill, on vacation or temporarily laid off. Also eligible are employees engaged in an economic strike that commenced less than 12 months before the election date and who retained their status as such during the eligibility period and their replacements. Those in the military services of the United States who are employed in the unit may vote if they appear in person or at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the

[20] In accordance with *Davison-Paxon, Co*., 185 NLRB 21 (1970), all PCAs and HHAs working 4 hours per week in the quarter preceding the eligibility date shall be eligible to vote in the election.

election date and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced. Those eligible to vote shall vote whether they desire to be represented for collective bargaining purposes by New York's Health and Human Service Union, 1199/SEIU, AFL-CIO, or by no labor organization.

LIST OF VOTERS

In order to assure that all eligible voters may have the opportunity to be informed of the issues in the exercise of the statutory right to vote, all parties to the election should have access to a list of voters and their addresses that may be used to communicate with them. *Excelsior Underwear, Inc*., 156 NLRB 1236 (1966); *N.L.R.B. v. Wyman-Gordon Company*, 394 U.S. 759 (1969). Accordingly, it is hereby directed that within 7 days of the date of this Decision, four (4) copies of an election eligibility list, containing the full names and addresses of all the eligible voters, shall be filed by the Employer with the undersigned who shall make the list available to all parties to the election. *North Macon Health Care Facility*, 315 NLRB 359 (1994). In order to be timely filed, such list must be received in the Regional Office, One MetroTech Center North-10th Floor (Corner of Jay Street and Myrtle Avenue), Brooklyn, New York 11201 on or before August 24, 2001. No extension of time to file the list may be granted, nor shall the filing of a request for review operate to stay the filing of such list except in extraordinary circumstances. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed.

NOTICES OF ELECTION

Please be advised that the Board has adopted a rule requiring that election notices be posted by the Employer at least three working days prior to an election. If the Employer has not received the notice of election at least five working days prior to the election date, please contact the Board Agent assigned to the case or the election clerk.

A party shall be estopped from objecting to the nonposting of notices if it is responsible for the non-posting. An Employer shall be deemed to have received copies of the election notices unless it notifies the Regional office at least five working days prior to 12:01 a.m. of the day of the election that it has not received the notices. *Club Demonstration Services,* 317 NLRB 349 (1995). Failure of the Employer to comply with these posting rules shall be grounds for setting aside the election whenever proper objections are filed.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, D.C. 20570. This request must be received by August 31. 2001.

Dated at Brooklyn, New York, this 17th day of August, 2001.

/s/ John J. Walsh
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